BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

MAX E. BENNINGFIELD, JR., Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB No. 87-108 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THIS MATTER, the appeal of a Notice of State Regulation (posting) requiring a reduction in the number of acres being irrigated came on for formal hearing before the Pollution Control Hearings Board in Yakima, Washington, on July 28, 1987, and September 8, 1987. The case was heard by Wick Dufford, Chairman. Board members Lawrence J. Faulk and Judith A. Bendor have reviewed the record and join in this decision.

Appellant was represented by J. Jarrette Sandlin, Attorney at Law. Respondent was represented by Peter R. Anderson, Assistant Attorney General.

Witnesses were sworn and testified. Exhibits were examined. From the testimony heard and exhibits examined, the Board makes these

FINDINGS OF FACT

I

In the late summer and fall of 1977, Max E. Benningfield, Jr., appellant herein, filed two applications for the appropriation of public groundwaters from a well in the Black Rock area of Yakima County. His applications were approved, permits were granted and, upon proof of appropriation two certificates of water right were issued to him on March 12, 1979. Each certificate was limited to a maximum withdrawal rate of 293 gallons per minute and an annual quantity of 212 acre feet. Two acre feet in each were allocated to domestic supply and stockwater; the remaining 210 acre feet were designated for use from March 1 to October 31 for the irrigation of 40 acres. Each certificate described a different 40 acre area as the place of use.

Thus, Benningfield acquired in the aggregate a right to apply 420 acre feet per year to 80 acres of land. This translates to an allowed duty of water of slightly more than 5 feet per acre.

II

Benningfield testified that he used the full water duty on the acreage from 1978 through 1984, growing alfalfa hay with three cuttings per growing season. However, in 1985 he switched to wheat, requiring about one-half the water he had been using. This year, 1987, he changed crops again, growing alfalfa for seed, needing from one-third to one-half as much water as he did originally with hay.

III

Prior to switching to less water intensive crops, Benningfield sold a portion of his certificated rights to Yakima County which was then developing a park nearby. The County purchased the rights, rather than initiating its own appropriation, because the Department of Ecology (DOE) has closed the Black Rock area to further appropriation until completion of a study to determine if there are limitations on the groundwater resource there. A number of applications for new appropriations are pending.

IV

Benningfield's intention was to sell the County an annual right to 50 acre feet of water -- 25 acre feet from each of his certificates. The sale was the subject of a meeting in February 1985, attended by Benningfield and by representatives of the County and of DOE. At this meeting DOE advised Benningfield that the sale of the water would result in a cutback of 10 acres in the rights he retained -- 5 acres from each certificate.

Benningfield went ahead with the transaction entering into an agreement to sell the 50 acre feet for $37,400 on March 8, 1985. The sale was expressly made contingent upon final approval by DOE. Subsequently, on March 15, 1985, Benningfield signed documents prepared by DOE assigning a portion of his rights from both

certificates. Each assignment bears the following written notation: "assignment of 100 gpm, 25 acre-feet per year for the irrigation of five acres."

V

Yakima County applied for and was granted a change of point of withdrawal and place of use for that portion of Benningfield's rights which it had purchased. DOE's approval of this change on May 24, 1985, was accompanied by a detailed Report of Findings of Fact and Decision in which the agency discussed the transfer which was being permitted and the terms of its approval. The Report contained the following:

> Groundwater Certificates No. G4-25445C and No. G4-25590C each authorized 295 gpm, 212 acre-feet per year from a well for the irrigation of 40 acres from March 1 to October 31 and single domestic supply. The place of use on G4-25445C is the NE 1/4 NW 1/4 of Section 27 and the place of use on G4-25590C is the SE 1/4 NW 1/4 of Section 27, all in T12N, R21E W.M. A total of 80 acres of hay has been irrigated. Upon approval of the application for change, five acres under each certificate will no longer be irrigated. Both certificates issued to Max E. Benningfield, Jr. He has agreed to sell the County, upon approval of the Department of Ecology, 100 gpm, 25 acre-feet per year for the irrigation of five acres from each of the certificates. If approved, the County would have the authority to use 200 gpm, 50 acre-feet per year for the irrigation of ten acres. (Emphasis added).

A copy of this Report and the decision to approve the changes the County applied for was sent to Benningfield. No appeal of the decision was filed.

VI

On February 6, 1986, DOE issued two superseding certificates to Benningfield, reflecting the change in his rights as a result of the sale to the County. Each certificate was reduced by 25 acre feet as to annual quantity and bore the further descriptive limitation: "185 acre-feet per year to be used from March 1 to October 31 for the irrigation of 35 acres." The description of the place of use remained the same as set forth (describing 40 acre areas) on the original certificates. No appeal was filed concerning issuance of these superseding certificates.

VII

In the spring of 1987, DOE personnel observed that Benningfield had not cut back on the acreage he was irrigating and that more than a total of 70 acres was being irrigated. Accordingly, on May 13, 1987, his withdrawal works were posted with a Notice of State Regulation. The Notice stated that Benningfield's lands under both of his certificates were being irrigated in excess of his rights and ordered him to refrain from irrigating more than 35 acres within the described place of use on each certificate. The posting was followed by mailing of the Notice to Benningfield by certified mail on May 15, 1987. The letter of transmission asked Benningfield to identify the 35 acres to be irrigated in each of the 40 acre areas described in his certificates.

VIII

An appeal to this Board followed on June 16, 1987. Benningfield challenged the Order to cut back his irrigation to 70 acres and requested a stay of the Order pending the hearing and decision on his appeal. The stay motion was argued on June 19, 1987 and granted by Order dated June 29, 1987. The stay was renewed after the hearing on July 28, 1987, to be dissolved upon the rendition of the Board's Final Order herein.

IX

Appellant Benningfield's father owns a one-half interest in the acreage in question. He asserts that he was not notified of the issuance of the superseding certificates, although he was aware of and approved of the sale of a portion of the rights to the County. Mr. Benningfield, Sr.'s interest is not disclosed on the documents relating to these water rights.

X

Appellant Benningfield concedes that he has been irrigating more than 70 acres during the present growing season. His appeal is based on the assertion that he is legally entitled to do so.

XI

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From the Findings of Fact, the Board comes to these

CONCLUSIONS OF LAW

I

Benningfield has raised several constitutional issues. We decline to consider them on the grounds that this Board's jurisdiction does not extend to the resolution of such questions. See Yakima County Clean Air Authority v. Glascam Builders, 85 Wn. 2d 255, (1975).

II

Benningfield makes five legal arguments under the water codes:

(1) He asserts that his two assignments of "25 acre-feet per year for the irrigation of five acres" described what was granted to the County but did not operate to reduce the authorized number of acres to be irrigated on his own farm. In other words, he maintains that he only sold rights to a specified annual quantity of water, not any rights to irrigate land area.

(2) He asserts that he is entitled to irrigate more than 70 acres within the two described places of use, so long as he does not exceed the aggregate of 370 acre feet annually allowed under his certificates.

(3) He asserts that he is entitled to irrigate the entire 80 acres described on his certificates during any growing season by "rotating" water among acres so that the entire acreage is not being irrigated at once.

(4) He asserts that DOE has unreasonably withheld permission to engage in the "rotation" described in (3).

(5) He asserts that DOE's issuance of the superseding certificates was defective for failure to notify Max E. Benningfield, Sr.

We will deal with these assertions in the order listed.

III

An appropriation right for irrigation is appurtenant to the land on which it is used. RCW 90.03.380. Therefore, when such a right is transferred and becomes appurtenant to new lands at a different location, no right to irrigate the original situs remains. See RCW 90.44.100; Schuh v. Department of Ecology, 100 Wn.2d 180 (1983).

Benningfield apparently wanted to transfer a quantity of water, while retaining use rights appurtenant to all his acres. However, his subjective desires in this matter are immaterial. The transaction, approved by DOE, involved the removal of rights from some of Benningfield's acres and their contemplated attachment to acres somewhere else. This effect occurred by operation of law when the transfer was made. Benningfield was without power to sell irrigation rights free of the operation of the appurtenance principle.

IV

The appurtenance principle has a corollary in the doctrine of beneficial use. The authorized duty of water for an acreage is merely a maximum quantity, up to which water can be applied in any year. But, each growing season the right for any acre is limited to the actual amount (within the maximum authorized) which is needed to grow the crop

selected. To use more would violate the limitation imposed by the doctrine of beneficial use and constitute prohibited waste. See RCW 90.03.005.

Thus, if a farmer has acquired a right to irrigate 80 acres, he has 80 acres worth of water which is variable in quantity depending on the requirements of the particular crop being grown. Should the farmer switch from a water-intensive crop to one requiring less water, his water right after the switch would be only to the amount needed for the new crop. Following such a crop change, he would not have any right to the no-longer-required amount previously used. He would have no such "surplus" to sell. He would have no such "surplus" to spread out over more acres.

When an irrigator sells a specified annual quantity of water, he is, in essence, selling the authorized maximum duty of water appurtenant to a certain number of acres. By the sale he is reducing his rights to irrigate by that number of acres. A change in his cropping pattern does not, by some alchemy, return to him the right to irrigate those acres.

We conclude, then, that Benningfield is not entitled to irrigate more than 70 acres, even if he remains within the acre-footage authorized by his certificates.

V

The notion that a right to irrigate an identified number of acres can be enlarged to irrigate a larger number of acres by simply moving

the water around while staying within the authorized maximum water duty is a variation on the same theme. We discussed this question in Kummer v. Department of Ecology, PCHB No. 85-188 (January 20, 1987). That case is on all fours with the instant one. There, as here, the certificates specified the number of acres to be irrigated within a larger described place of use. There, as here, the right holder, without appealing issuance of the certificates, sought to apply water annually over the entire described place of use in amounts not exceeding the authorized duty specified for a smaller number of acres. In Kummer, we noted that rights acquired by irrigators under the water codes must be within the scope of the permission granted by the state. We then said.

> With respect to the legally described places of use the Kummers have sought authority to irrigate, Ecology has imposed explicit and unambiguous limits. Under each certificate only 15 acres may be beneficially irrigated during any year. By logical necessity this restricts irrigation under each certificate to the first 15 acres irrigated in the year. The total number of acres on the farm which may be irrigated is thus 30 per annum.
>
> As a matter of law, the Kummers simply have not acquired the right to irrigate more than this. (Emphasis added).

Such reasoning applies here. Benningfield possesses no right to irrigate acreage exceeding the limits in his superceding certificates.

VI

The record does not disclose that Benningfield has ever asked DOE

for permission to engage in "rotation" of water. RCW 90.03.390 empowers DOE to allow "rotation", but appellant has misconceived the term. True "rotation" involves allowing differing users to alternate their use from one day to the next when the supply is not sufficient to satisfy all simultaneously. What appellant here seeks is not "rotation", but acreage expansion beyond the authorized limits of his certificates. Permission for this has not been unreasonably withheld. Even if it had been requested, it could not lawfully be permitted.

VII

If DOE failed to notify Max E. Benningfield, Sr. of the issuance of the superseding certificates, no error was committed. The law does not require that a person be the owner in fee of the realty in order to apply for or acquire a water right on a tract. RCW 90.03.250; RCW 90.44.066. Moreover, it is quite possible for the owner of water rights on a piece of land to be different from the owner of the fee interest. See Weintensteiner v. Enghahl, 125 Wash. 106 (1923). Therefore, the senior Benningfield's interest in the property was not something which DOE had an obligation to discover or which imposed on the agency any duty. If Mr. Benningfield, Sr. wanted notice, he should have taken steps to request it.

VIII

The short answer to all of appellant's arguments is that his failure to appeal the issuance of the superseding certificates now forecloses his effort to overturn the limitations they contain. RCW

43.21B.120. However, the superseding certificates issued by DOE to Benningfield embody the understanding of the law set forth above, and we believe that understanding is correct.

In sum, we hold that appellant's arguments must be rejected and that DOE's posting of Benningfield's well must be upheld.

IX

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

The Notice of State Regulation issued by the Department of Ecology to Max E. Benningfield, Jr., on May 13, 1987, is AFFIRMED.

DONE in Lacey, Washington, this 5th day of November, 1987.

POLLUTION CONTROL HEARINGS BOARD

Wick Dufford
WICK DUFFORD, Presiding

Lawrence J. Faulk 11/5/87
LAWRENCE J. FAULK, Member

Judith A. Bendor
JUDITH A. BENDOR, Member